LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 2 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 164

ABRAHAM POTTER, MAXWELL POTTER, and HAROLD POTTER, Co-Partners doing business as POTTER'S CAMERA STORE,

Petitioners,

against

THE UNITED STATES,

Respondent.

REPLY BRIEF FOR PETITIONER

JOSEPH GOLDBERG
20 East 46th Street
New York, N. Y. 10017
Attorney for Petitioners

IN THE

Supreme Court of the United States

October Term, 1965

No. 164

ABRAHAM POTTER, MAXWELL POTTER, and HAROLD POTTER,
Co-Partners doing business as POTTER'S CAMERA STORE,

Petitioners,

against

THE UNITED STATES,

Respondent.

REPLY BRIEF FOR PETITIONER

Statement

This brief is submitted by petitioners in reply to the brief in opposition filed by THE UNITED STATES.

Argument

1. The hyper-technical grounds upon which THE UNITED STATES chose to oppose this petition are without legal or factual foundation.

The petition for a writ of certiorari was timely filed. It was filed 90 days following the denial of petitioners' motion for a rehearing by the Court of Claims. The motion for a rehearing was filed in the Court of Claims long prior to the expiration for the time within which a petition for a writ of certiorari may be filed. These facts alone totally distinguish this case from *Conboy* v. *First National Bank of Jersey City,* 203 U. S. 141, relied upon by THE UNITED STATES in its brief in opposition. There the motion for a rehearing was made after the time to appeal expired. However, at page 145 of its opinion, this court held that "an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal . . .". In the case at bar, petitioners' time for taking an appeal or petitioning for a writ of certiorari had not expired before their motion for a rehearing was made to the Court of Claims.

The petition for a writ of certiorari was filed 90 days following the denial by the Court of Claims of petitioners' motion for a rehearing. The motion for a rehearing was filed long prior to the expiration of their time to petition this court for a writ of certiorari. Petitioners' time to file their motion for a rehearing was extended by the Court of Claims to December 14, 1964. Under Rule 9(c) of the Rules of the Court of Claims petitioners had until December 17, 1964 to file their motion for a rehearing. The motion was mailed to the court on December 17, 1964 but was apparently not received until December 21, 1964. Thereupon the court informed petitioners' attorney that the motion was not timely filed and suggested that a motion for leave to

file out of time be made. Such motion was made by the petitioners and was granted on January 8, 1965, the court ordering that the motion for a rehearing be deemed filed. Implicit in its January 8, 1965 order is compliance and conformity with Rule 9(b)(1)(2) of the Rules of the Court of Claims. These rules authorize the Court of Claims to enlarge a period of time even though the motion for enlargement is not filed within the time for the performance of the act for which the enlargement of time is sought. By allowing such motion to be filed out of time the Court of Claims cured any element of non-timeliness.

Following the filing of the motion the court considered it on its merits. On February 19, 1965, it denied petitioners' motion for a rehearing. This court has repeatedly held that the judgment of a court originally entered does not become final until the denial of a motion for a rehearing and the time to appeal runs from the date of such denial. Consequently it cannot be argued by THE UNITED STATES that the petition for a writ of certiorari herein was not timely filed.

Furthermore, this court has held that where a lower court entertained a non-timely petition for a rehearing, and, denied it after considering its merits the time for taking an appeal runs from the date of the denial of the motion for a rehearing despite the non-timeliness thereof. *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Thompson* v. *Immigration and Naturalization Service*, 375 U. S. 384; *Gypsy Oil Company* v. *Escoe*, 275 U. S. 498; *Harris Trucking, Inc.* v. *Cherry Meat Packers Inc.*, 371 U. S. 215; *Wolfsohn* v. *Hankin*, 376 U. S. 203; *Wayne United Gas Co.* v. *Owens Illinois*

Glass Co., 300 U. S. 131, 137; *Voorhees* v. *John T. Noye Mfg. Co.*, 151 U. S. 135, 137. If it may be assumed that petitioners' motion for a rehearing in the Court of Claims was not timely filed it therefore follows that a petition for a writ of certiorari may still be filed 90 days following the denial where, as here, the lower court concluded that the motion for a rehearing was properly made and thereupon considered it on its merits. Since the motion for a rehearing was denied on February 19, 1965 the filing of the petition for a writ of certiorari on May 20, 1965 was entirely timely.

2. No new position is taken by petitioners in their petition for a writ of certiorari. Petitioners argued on pages 5-11 of their reply brief before the Court of Claims as they do here that the administrative record was not supported by substantial evidence. Expressly stated during the course of this argument was that the jurisdiction of the Court of Claims was limited to a review of the administrative record upon the basis of *United States* v. *Carlos Bianchi, Inc.*, 373 U. S. 709. Accordingly the argument raised by THE UNITED STATES in paragraph 2 of its brief in opposition is patently without merit.

3. The government's criticisms of petitioners' attack upon the proceedings before the General Services Administration is likewise without merit since they are not supported by a single citation or statutory reference. In contradistinction, the argument urged by petitioners that the Court of Claims should have reversed the administrative determination since it was not supported by substantial evidence and rested solely upon unsworn testimony is supported by ample authority.

4. In that portion of the government's brief in opposition entitled "Statement" allegations are made which are extraneous to the issues presented by the petition for a writ of certiorari and which are not supported by the evidence. In brief reply it is sufficient to state that the Court of Claims, in its opinion, confirmed the Trial Commissioner's findings that no adequate comparative tests were run upon the revolvers which petitioners sought to furnish under the contract (Pet. App. 9A). With respect to petitioners' alleged lateness in delivery it must be noted that the government waived the December 3, 1956 delivery date by failing to terminate the contract on that date for non-delivery. (Cuneo, Waiver of Due Date in Government Contracts, 43 Virginia Law Review 1). Insofar as the holding by the Court of Claims that petitioners were unable to procure revolvers, bullets and handcuffs within the time specified by the contract or a reasonable time thereafter, the authorities relied upon the Court of Claims were inapposite having no relevance to the facts of the case at bar. Consequently the recitation of these findings by the government within the context of the petition for a writ of certiorari is indeed inappropriate.

CONCLUSION

For the foregoing reasons as well as the reasons set forth in the petition for a writ of certiorari petitioners respectfully request that the petition be granted.

Respectfully submitted,

JOSEPH GOLDBERG,
Attorney for Petitioners.